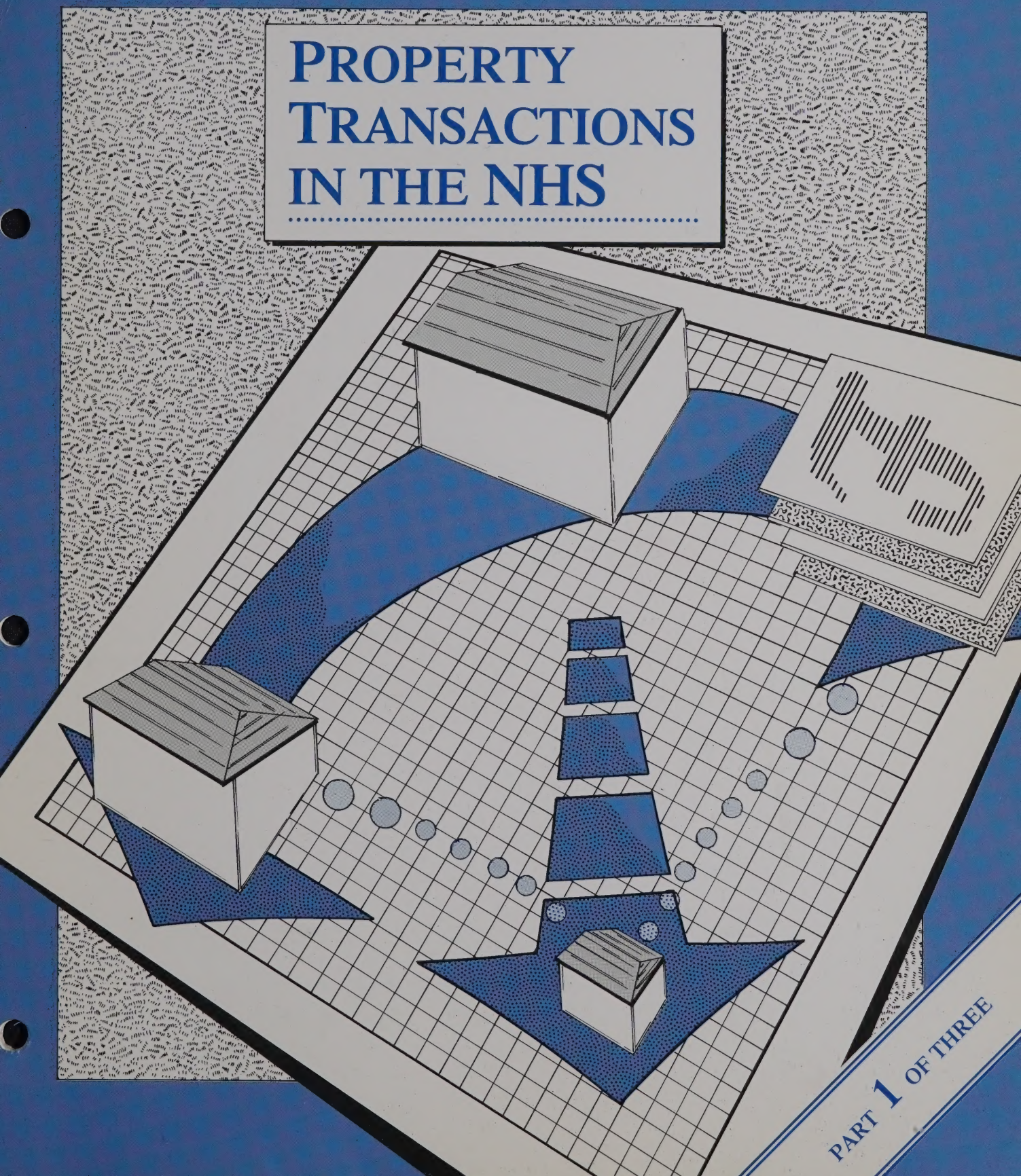
MC0326

DEPARTMENT OF HEALTH

ESTATECODE

PROPERTY TRANSACTIONS IN THE NHS



PART 1 OF THREE

DEPARTMENT OF HEALTH

ESTATECODE

PROPERTY TRANSACTIONS IN THE NHS

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DEPARTMENT OF HEALTH

Part of
ESTATECODE
Level 1

PROPERTY TRANSACTIONS IN THE NHS

Part 1

Mandatory Requirements for Health Authorities

Department of Health
Euston Tower, 286 Euston Road, London NW1 3DN

JULY 1989

Preface to Part 1 and Part 2

1. Circular HC(86)13 advised Health Authorities (HAs) on what was expected of them in respect of estates work. This document sets out what is required of HAs in safeguarding the Secretary of State's estate and in conducting property transactions. Part 1 comprises the mandatory requirements on property transactions with which HAs *must* comply. Part 2 contains the procedures to be used when HAs are implementing Part 1. Part 3 comprises matters of general guidance which HAs may use depending on the specific case and the views of their professional advisers. All three parts have been incorporated into ESTATECODE in order to emphasise that property transactions are not an end in themselves but are one element, albeit an important element, of the overall policies and procedures in the management of the NHS estate.

2. The document has been written for use by Regional Health Authorities (RHAs) and District Health Authorities (DHAs). Separate instructions on the implementation of the document will be issued to the Special Health Authorities for the London Postgraduate Teaching Hospitals (SHAs), to Family Practitioner Committees (FPCs) and to the Special Hospitals Service Authority.

3. In this document the word 'property' is used to mean land with or without building(s) on it. Where the term 'Health Authority' (HA) is used it is intended as a reference to either a Regional or District Health Authority depending on the arrangements made, and extent of delegation, by individual Regions.

4. Where reference to the Department is indicated, submissions should be sent to:

Department of Health
NHS Estate Directorate
Euston Tower
286 Euston Road
London NW1 3DN

unless a specific Divisional reference is stated.

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1. *The Legal Status of the Estate and General Policy on Land Transactions*

General

1.1 All NHS property is vested in the Secretary of State for Health (who holds property not as beneficial owner, but as trustee for the Crown for the purposes of the Department); it is therefore Government property and subject to the policies which apply to Government property generally. NHS property is occupied and managed by Health Authorities on behalf of the Secretary of State and they must act within the instructions set out in this document.

Powers of the Secretary of State

1.2 Under section 87 of the NHS Act 1977 the Secretary of State may acquire (either by agreement or compulsorily) and maintain property required for the purposes of carrying out the functions of the Act, and under section 7(2)(b) of the Health and Medicines Act 1988 the Secretary of State may acquire land by agreement and manage and deal with land in order to make more income available to the health service.

1.3 The Secretary of State has no specific statutory power to dispose of property. The power to dispose of property which is surplus to requirements, ie no longer needed for the purposes of the health service, derives from the Crown which may dispose of such property except where prevented by Statute from so doing.

Powers of Regional and District Health Authorities

1.4 Except for the power to acquire property compulsorily, the Secretary of State has directed RHAs to exercise his powers (relating to section 87 of the 1977 Act) by the NHS Functions (Directions to Authorities and Administration Arrangements) Regulations 1989 (SI 1989/51), subject to such limitations and directions as may be given. A Direction dated 3 July 1989 (copied at Appendix 1) has accordingly been given, setting out the powers for and limitations on action by RHAs. Under this Direction RHAs may:

- acquire and dispose of property
- seal documents
- give directions to DHAs.

1.5 DHAs have no authority to undertake property transactions other than within the terms of any Directions given by their RHA. Where functions are to be delegated to

DHAs, they will need to be authorised to act by an instrument in writing issued by the RHA in accordance with section 14 of the NHS Act 1977, having regard to the limitations set out in the Direction dated 3 July 1989 from the Secretary of State to RHAs.

1.6 Under the Directions on Income Generation dated 23 February 1989 (reproduced as Annex A to HC(89)9) RHAs and DHAs have delegated authority to exercise the Secretary of State's power (relating to section 7(2)(b) of the 1988 Act) to acquire, manage and deal with land for the purposes of making more income available to improve the health service. This Direction is subject to, and must be read in conjunction with, the main Direction of 3 July 1989. It does not enable DHAs to acquire land or property for purposes other than income generation and the words "manage and deal with land" do not convey the power to dispose. Further guidance is given in Advice Paper 5.

Professional Advice

1.7 HAs must obtain early and regular professional advice to assist in the efficient management of the NHS estate and to meet their obligations to conduct property transactions in a manner which safeguards the Secretary of State's interest. Sources of advice are set out in Advice Paper 1.

Legal Advice

1.8 HAs must have available the services of a legal adviser (either in-house or private) who can deal with all legal aspects of property transactions. The legal adviser is responsible for taking all necessary steps to safeguard the Secretary of State's legal interest whether as purchaser, vendor, lessee or lessor, including the investigation of title and of any covenants, restrictions or charges affecting the use of the property. HAs must not allow entry onto property or enter into a contract without taking advice from the legal adviser.

Accountability

1.9 As a recognised safeguard to public funds and to satisfy the requirements of Parliamentary accountability, all transactions must be carried out in accordance with the recommendation of the District Valuer (DV) unless the Department has authorised other arrangements. Where other arrangements have not been authorised, HAs wishing to act other than in accordance with the DV's recommendation must consult the Department who, in turn, may be required to consult the Treasury. No commitment should be given pending the Department's decision.

Status of Trust Property

1.10 Property vested in HAs on trust is deemed to be private property. It should be managed by the trustees in accordance with the terms of the trust.

Crown Exemption

1.11 Unless an Act applies specifically to the Crown, the NHS (as a Crown body providing services for which the Secretary of State is statutorily responsible) is entitled to Crown exemption. Notwithstanding Crown exemption, HAs must always comply with the spirit and intention of an Act, and they must adopt and follow any parallel non-statutory procedures laid down.

Restrictive Covenants

1.12 The Secretary of State has power under section 87(1) and (5) of the 1977 Act to override restrictive covenants on land acquired by agreement after 31 March 1974 in pursuance of his statutory functions. Where he does so, action for damages, or for an injunction, cannot be taken but the person entitled to benefit under the covenant can apply for compensation under section 7 or 10 of the Compulsory Purchase Act 1965.

Compulsory Purchase Orders

1.13 The Secretary of State has the power to acquire property compulsorily where it is not possible to acquire by agreement, provided that the property concerned is needed for health service purposes and that there are no other suitable alternative properties available. There is no power to acquire property compulsorily to facilitate the disposal, or enhance the value, of surplus NHS property. Where RHAs consider that there is justification for using compulsory powers they must consult the Department setting out the full circumstances of the case. If the Secretary of State agrees to proceed by way of compulsory purchase more detailed instructions will be given by the Department.

1.14 NHS land, being Crown land, cannot be acquired compulsorily by other bodies. Where NHS land is included in a compulsory purchase order, HAs (acting on behalf of the Secretary of State) must consider whether the land can be released and if so they should agree terms after consultation with the DV.

National Health Service Act 1977
and
Health and Medicines Act 1988

Health Authorities Land Transactions Directions 1989

The Secretary of State for Health, in exercise of powers conferred by sections 13, 14 and 17 of the National Health Service Act 1977[1], section 7 of the Health and Medicines Act 1988[2], and of all other powers so enabling him, hereby gives the following directions:—

1. These directions shall come into force on the 31st day of July 1989.

2. — (1) In these directions —

"the Act" means the National Health Service Act 1977;

"the directions" means the directions given by the Secretary of State headed "Directions on Income Generation" and dated 23 February 1989;

"the regulations" means the National Health Service Functions (Directions to Authorities and Administration Arrangements) Regulations 1989 (S.I. 1989/51);

"relevant Regional Health Authority" means the Regional Health Authority of which the region includes the district of the District Health Authority in question.

(2) Unless the context otherwise requires, references to land are references to land vested in the Secretary of State for the purposes of the Act and the Health and Medicines Act 1988.

3. A Regional Health Authority shall exercise, as respects its region and as respects anywhere outside its

(1) 1977 (c.49); sections 13 and 14 were amended respectively by paragraphs 33 and 34 of Schedule 1 to the Health Services Act 1980 (c.53) and section 17 was substituted by paragraph 2 of Schedule 3 to the Health and Social Security Act 1984 (c.48).
(2) 1988 (c.49).

region that the Secretary of State may direct, his power to dispose of land or of any interest therein and any directions given by a Regional Health Authority to a District Health Authority to exercise such power shall secure that such power is made exercisable subject to such limitations as the Secretary of State may direct with respect to the exercise thereof and in accordance with any directions which he may give or, subject to any such directions, which may be given by the relevant Regional Health Authority.

4. A Regional Health Authority or District Health Authority in exercising the functions relating to land directed by the entry in Schedule 1 to the regulations relating to section 87 of the Act, or by paragraph 1 of the directions relating to acquiring, managing and dealing with land, or by paragraph 3 above to dispose of land or of any interest therein, shall do so in accordance with the procedures or instructions for the time being in force issued by the Department of Health in the document "Property Transactions in the NHS" and any other instructions which may be given in writing by that Department.

5. Where the exercise by a Regional Health Authority or District Health Authority of the functions referred to in paragraph 4 above of acquiring or disposing of land or any interest in land on behalf of the Secretary of State necessitates the execution under seal of any document, the Regional Health Authority shall, on behalf of the Secretary of State, execute such document under its own seal, and shall secure that no directions are given to any District Health Authority to execute any such document which is required by law to be under seal.

6. Where the exercise by a Regional Health Authority or District Health Authority of the functions referred to in paragraph 5 above necessitates the execution, otherwise than under seal, of any document, that Authority shall make arrangements for a member or officer of that Authority duly authorised for that purpose to sign the document for the Authority on behalf of the Secretary of State.

7. Without prejudice to the powers of a Regional Health Authority under sections 14 and 17 of the Act and the regulations, under which a relevant Regional Health Authority may direct a District Health Authority to assist with the purchase or disposal of land, a District Health

Authority so directed may execute on behalf of the Secretary of State the following classes of documents:—

a. leases, or extensions or renewals of leases, granted to or by the Secretary of State where the lease is not required by law to be under seal (ie for a period not exceeding 3 years);

b. licences or other instruments granting rights not amounting to an easement, over land, not required by law to be under seal;

c. instruments granting tenancies for not more than 364 days, or licences to occupy land for use as agricultural land;

d. licenses to occupy land for the purpose only of grazing or mowing for a specified period of the year not exceeding 364 days.

8. The directions given by the Secretary of State for Social Services in relation to land transactions dated 20 March 1974, 17 December 1975 and 11 March 1980 are hereby revoked, but without prejudice to anything duly done or suffered under them or to any right, privilege, obligation or liability acquired, accrued or incurred under them.

Dated the 3rd day of July 1989

The Official Seal of the Secretary of State for Health hereunto affixed is authenticated by

T WHITELEY
Assistant Secretary
Department of Health

2. *Estate Records*

Legal Documents

2.1 RHAs are responsible for keeping all property documents, eg title deeds, leases, land registry certificates and similar documents in respect of all NHS property within their Region or managed extra-territorially. RHAs may delegate this responsibility to DHAs except in relation to properties held for regional purposes. Where responsibility is delegated, RHAs must keep a record showing the location of these documents.

Estate Terriers

2.2 RHAs must ensure that an estate terrier is prepared (in-house, by the DV or a private practitioner) and kept up to date for all property for which they are accountable to the Secretary of State. RHAs may delegate this responsibility to DHAs but, in that event, RHAs must keep a copy of the terrier. The terrier for each site must comprise:

- a site plan (for this purpose a site is defined as the area within a ring fence)
- a written description embracing all land and buildings; acreage; tenure (freehold or leasehold); easements, rights or licences; charges, restrictions or covenants; and a schedule of occupation and tenancies
- other information which the RHA considers appropriate.

Transfer of Records

2.3 Where a property is transferred from one NHS Authority to another, the estate records must also be transferred.

3. *Acquisition of Property*

General

3.1 Where additional property is needed as part of a new capital scheme the mandatory CAPRICODE procedures will apply. These include a formal option appraisal to ensure that the new capital investment (with its associated revenue implications), together with other estate rationalisation proposals, represents the best value for money. The possibility of other HAs having surplus property should not be overlooked and enquiries must always be made of neighbouring HAs before any new property is purchased. HAs may also acquire property by entering into exchanges with non-NHS parties where to do so is in the interests of the NHS. Where, following option appraisal, approval in principle is given to a proposed acquisition HAs may acquire the property without further reference to the Department. Property must not be acquired in advance of approval in principle (regardless of the scheme's capital costs) without the specific authorisation of the Department.

Basis of Valuation

3.2 In acquisitions where the Secretary of State's powers of compulsory purchase are available, the terms agreed must not exceed the compensation which would be payable on the basis of the current statutory code for compulsory acquisition. In acquisitions where compulsory powers are not available the terms should be assessed on the basis of the current market value. Where land is acquired from new town development corporations special arrangements apply. They are set out in MHLG Circular M199 (dated 11 December 1962) and provide for the transaction to be at a price which is the mean of the value of the land if the presence of the new town is taken into account and the value of the land if the new town is ignored.

Consultation with Planning Authorities

3.3 Where an HA proposes to acquire a property and make a material change in its use not falling within the same class as set out in the Town and Country Planning (Use Classes) Order 1987 (SI 1987/764), the local planning authority must be consulted (in accordance with the arrangements for consultation as set out in DOE Circular 18/84 (see Procedure Paper 1)), before the property is purchased unless the time needed for such consultation seems likely to result in the loss of the opportunity to buy the property.

Taking Leases

3.4 HAs must always aim to purchase rather than lease. Where, however, purchase is not possible, or would be clearly

uneconomic or inappropriate, property may be taken on lease provided that this course of action is in accordance with the option appraisal. However, the Department has only limited delegated authority to approve the taking of leases, and proposals to take leases (or extensions of leases) where the rental exceeds £50,000 per annum, or where the premium for the lease exceeds £250,000, should be submitted to the Department with all supporting background papers for reference to the Treasury.

3.5 Where property is taken on lease HAs must:

- ensure that the terms of the lease are fully complied with
- avoid incurring any penalties contained in the lease
- have regard to the provisions of the Landlord and Tenant Acts and the Law of Property Act 1969.

Further advice is given in Procedure Paper 3.

4. *Surplus Property*

Alternative Health Service Use

4.1 Where the existing use of a property is soon to cease and no other use is envisaged, HAs must consider whether the property (including any unexpired portion of a lease) might be required for:

- use for a Regional (or sub-Regional) function or by another HA — DHAs must check this possibility with their RHA, neighbouring HAs and, where property is managed extra-territorially, with the territorial RHA and DHA. (HAs in London must also check with the SHAs for the Postgraduate Teaching Hospitals.)

- use as surgery premises to provide services for NHS patients — where requests are made by Family Practitioner Committees, general practitioners or the General Practice Finance Corporation

- use by Special Trustees for health related purposes

- use for Care in the Community purposes — where a joint finance scheme is envisaged.

Freehold property transferred under the above arrangements should be on the basis of the open market value as assessed by the DV. However, since all NHS property is vested in the Secretary of State, cash should not change hands when properties are transferred between HAs or between HAs and FPCs. The accounting procedure applying to such a transaction is set out in Section 5.

Consideration of Optimum Return

4.2 Where there are no alternative health service uses for a property, HAs must consider with their professional advisers how to achieve the optimum return from the property. This need not necessarily take the form of an outright sale of the freehold since section 7(2)(b) of the Health and Medicines Act 1988 provides a power to acquire land by agreement and manage and deal with land. Surplus property may therefore be sold or leased out for commercial purposes or for development. HAs must also be alive to the prospects of enhancing the value of an existing site by the acquisition of an adjoining or adjacent site and must have regard to Advice Paper 5.

Planning Permission

4.3 To secure the best price possible, property which has potential for development should normally be sold with the

benefit of planning permission. HAs or their agents must therefore establish the most favourable planning potential by making an application under the Town and County Planning Act 1984 unless there are overriding reasons in terms of best marketing practice for not doing so and the DV concurs. Where the planning clarification sought amounts to the redevelopment of a site entailing demolition of a building which is listed or is in a conservation area, the 1984 Act enables HAs to apply to the local planning authority for the necessary listed building consent or conservation area consent.

Sale of Freehold

4.4 *General.* Where the freehold of a property is to be sold the disposal must be conducted in a publicly acceptable manner and HAs must be guided by the professional advice of the DV and any appointed agents on the best method of selling a site. Advice Paper 2 sets out various methods of disposal together with the advantages and disadvantages attaching to each method and Advice Paper 4 deals with participation and profit sharing arrangements.

4.5 *Sale to Former Owners.* In certain circumstances surplus NHS property must be offered back to former owners or their successors before it is put on the open market for sale. The rules which determine this course of action are set out in Procedure Paper 5.

4.6 *Residential Property.* The statutory 'right to buy' scheme obtaining under the Housing Act 1985 (as amended by the Housing and Planning Act 1986 and the Housing Act 1988) does not apply to Crown property. Occupiers of NHS residential accommodation do not therefore have a 'right to buy'. However, it is the Department's policy to offer occupiers (whether or not they are NHS employees) the opportunity to acquire the accommodation they live in if it is surplus to NHS needs (ie will not be replaced). HAs must follow the procedures set out in Procedure Paper 4.

4.7 *Completion.* Where a sale can be completed at the price recommended by the DV, HAs should complete the transaction without reference to the Department.

Leasing Out Surplus Property

4.8 *General.* Where the professional advice is to the effect that the optimum benefit will be achieved by leasing out, HAs must manage the leased property in accordance with sound commercial practice having due regard to the Landlord and

Tenant Acts, the Law of Property Act 1969 and the Agricultural Holdings Act 1986. Further guidance is given in Procedure Paper 2 and advice on development leases is given in Advice Paper 5.

4.9 *Concessionary Leases.* Where a voluntary body wishes to use surplus NHS property to provide a service which complements an NHS service, or which would otherwise have to be provided by HAs, consideration may be given to granting a concessionary lease. Concessionary leases must be justified by the expectation that the financial loss will be matched by equivalent financial or other benefits to the NHS. Further guidance is given in Procedure Paper 2.

Use of Proceeds from Sales

4.10 *General.* In order to encourage DHAs to identify surplus property it is Ministers' policy that DHAs should benefit from the proceeds of sales. RHAs must therefore pass a significant proportion of the sale proceeds to initiating DHAs, within a time-scale which is compatible with agreed strategies, unless the sale results from the provision of a new capital funded facility in which case the RHA may first recoup their capital outlay. This policy will be reviewed on the introduction of capital charging.

4.11 *Hospitals for the Mentally Ill and Mentally Handicapped.* The general principles of paragraph 4.10 should apply, but in the case of the larger hospitals Ministers have made clear that closure must be preceded by the building up of comprehensive alternative services covering the whole of the hospital's catchment area — which may cover more than one District. This will often have necessitated the provision of capital funded facilities to varying extents over many years. In these cases the RHA should use its discretion as to which Districts should benefit from the sale proceeds — within the general requirement that proceeds should be specifically used for development of services for the client group concerned unless there are very exceptional circumstances and the Department has agreed otherwise.

Use of Proceeds from Leasing

4.12 The income from leasing out property should be retained by HAs as additional to revenue allocations.

Registers of Public Bodies' Land

4.13 Part X of the Local Government Planning and Land Act 1980 empowers the Secretary of State for the Environment to compile and maintain in England registers of

unused and underused land (including buildings) held by public bodies and their subsidiaries (whether or not the land is required for future use). HAs must participate and co-operate in the arrangements. The Registers provide additional publicity for NHS land awaiting disposal. Further advice is given in Procedure Paper 5.

5. *Execution of Land Transactions*

Contracts

5.1 In accordance with regulation 12 of the NHS (Regional and District Health Authorities: Membership and Procedure) Regulations 1983 (SI 1983/315), RHAs must specifically empower General Managers and other officers or members authorised to sign documents in accordance with the RHAs' Standing Orders, to execute contracts relating to land transactions on behalf of the Secretary of State.

Conveyances

5.2 Conveyances must be drafted in terms of the Secretary of State as one party with HAs acting on his behalf. Where documents of title require to be sealed, the common seal of the RHA must be used in accordance with the Authority's Standing Orders. Procedure Paper 5 gives advice on the form of deeds.

Certificate that Property is Vested in the Secretary of State

5.3 Where property that was taken over either in 1948 or 1974 is to be disposed of, the purchaser/transferee may require a certificate that the land was transferred to, and vested in, the Minister of Health on 5 July 1948 or the Secretary of State on 1 April 1974 as the case may be. Where so requested HAs should provide a Statutory Declaration to this effect. Where difficulties arise HAs should refer such requests to the Department forwarding, with the application, a plan and description of the property including its area and stating the owner and use of the property immediately prior to 5 July 1948 or 1 April 1974.

Accounting Arrangements

5.4 Receipts and purchases, together with any professional fees incurred and associated costs of accommodation works, must be accounted for as in the Manual for Accounts issued for use with the NHS Revised Accounting System.

5.5 Where freehold property is transferred between DHAs of the same RHA, the RHA should make an adjustment to both HAs' cash limits; where the transfer is across RHAs, or involves an SHA for the London Postgraduate Teaching Hospitals, the Department (FA1B) must be informed so that a Regional cash limit adjustment can be made; where the transfer is between an HA and an FPC, the Department (FA2A) must be informed so that a cash limit adjustment can be made.

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